

District Judge James L. Robart

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEA SHEPHERD LEGAL,

Plaintiff,

v.

NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION,
an agency of the United States; NATIONAL
MARINE FISHERIES SERVICE, *an agency
of the United States*,

Defendants.

CASE 2:19-cv-463-JLR

PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
December 11, 2020

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INTRODUCTION

Plaintiff Sea Shepherd Legal (“SSL”) filed the above-captioned lawsuit under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, against Defendants National Oceanic and Atmospheric Administration (“NOAA”) and the National Marine Fisheries Service (“NMFS”) seeking disclosure of agency records. SSL now challenges Defendants’ improper redaction of certain records under FOIA Exemptions 5, 6 and 7. When an agency invokes a FOIA exemption, the agency bears the burden of establishing that the exemption is appropriate.

Defendants have not established that the redacted information is exempt from FOIA disclosure or that the information would harm an exemption-protected interest if released for the following primary reasons:

- Defendants’ *Vaughn* index is grossly insufficient – failing (among other things) to explain Defendants’ rationale for redacting information from the identified records.
- The Exemption 5 redactions involve records that are not pre-decisional or deliberative.
- The Defendants’ decision, under the Marine Mammal Protection Act (“MMPA”), as to whether a foreign government’s marine mammal protections in its commercial fisheries are “comparable” to those in the United States does not have a “law enforcement purpose,” as required for reliance upon Exemption 7.
- Disclosure of names redacted pursuant to Exemptions 6 and 7(C) would serve a public purpose.
- Even to the extent that some of the redactions are technically warranted, there would not be any foreseeable harm to Defendants from their disclosure – as required by the FOIA Improvement Act of 2016.

1 Accordingly, SSL respectfully moves the Court for an order granting summary judgment
2 against Defendants.

3 **FACTUAL BACKGROUND**

4 **I. SSL'S FOIA REQUESTS**

5
6 On December 21, 2018, SSL submitted a FOIA Request to Defendants regarding the
7 critically endangered Māui dolphin. Declaration of Brett W. Sommermeyer, dated November 19,
8 2020 ("Somm. Decl."), Ex. 1 ("First FOIA Request"). Specifically, SSL requested all records
9 relating to a number of items, including, NMFS's analysis of bycatch of, or other interactions with,
10 Māui dolphins in New Zealand fisheries, NMFS's communications with New Zealand authorities,
11 and NMFS's analysis or consideration of the application of the Fish and Fish Product Import
12 Provisions of the Marine Mammal Protection Act, 16 U.S.C. § 1361 et seq. ("MMPA"), to New
13 Zealand fisheries interacting with the Māui dolphin. *Id.*

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15
16 On July 15, 2019, SSL submitted a second FOIA Request regarding the Māui dolphin to
17 Defendants. Somm. Decl. Ex. 2 ("Supplemental FOIA Request"). In that request, SSL requested
18 all records "created or acquired" since the search cutoff date for SSL's First FOIA Request (March
19 18, 2019) relating to some of the same categories as in its previous request, plus documents related
20 to NMFS's preparation of the *Notification of the Rejection of the Petition To Ban Imports of All*
21 *Fish and Fish Products From New Zealand That Do Not Satisfy the Marine Mammal Protection*
22 *Act*, 84 Fed. Reg. 32853 (July 10, 2019).

23
24 Although Defendants claim that NMFS has released all non-exempt records responsive to
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1 SSL's Requests,¹ NMFS's responses to SSL's Requests were nonetheless inadequate. NMFS
 2 redacted many of the records it released under FOIA Exemptions 5, 6 and 7. *See* 5 U.S.C. §
 3 552(b)(5)-(7). After careful review, SSL has determined that many of NMFS's redactions under
 4 those exemptions were improper.
 5

6 **II. THE MARINE MAMMAL PROTECTION ACT IMPORTS PROVISION**

7 Section 101(a)(2) of the MMPA states that the Secretary of the Treasury "shall ban the
 8 importation of commercial fish or products from fish which have been caught with commercial
 9 fishing technology which results in the incidental kill or incidental serious injury of ocean
 10 mammals in excess of United States standards." 16 U.S.C. § 1371(a)(2) ("Imports Provision").
 11 NMFS engaged in rulemaking in 2016 to implement the Imports Provision, establishing
 12 "procedures and conditions for evaluating a harvesting nation's regulatory program addressing
 13 marine mammal incidental mortality and serious injury in its export fisheries, to determine whether
 14 it is comparable in effectiveness to the U.S. regulatory program." Fish and Fish Product Import
 15 Provisions of the Marine Mammal Protection Act, 81 Fed. Reg. 54389, 54390 (Aug. 15, 2016).
 16

17 To receive a comparability finding, a harvesting nation must first demonstrate that it has,
 18 with limited exceptions, prohibited the intentional mortality or serious injury of marine mammals
 19 in the course of commercial fishing operations. *Id.* Second, the harvesting nation must demonstrate
 20 that it has "adopted and implemented, with respect to an export fishery, a regulatory program
 21 governing the incidental mortality and serious injury of marine mammals in the course of
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 27 ¹ NMFS labeled the records it released to SSL with "DocID" numbers formatted "0.7.2984.#####.#" (the ".#" at the
 28 end indicating that the record is an email attachment). Because each record's DocID number begins with "0.7.2984,"
 SSL omits that segment of the DocID number when referring to specific documents herein.

1 commercial fishing operations in its export fishery that is comparable in effectiveness to the U.S.
 2 regulatory program.” *Id.* In cases where NMFS has not yet issued a comparability finding, it “may
 3 consider emergency rulemaking to ban imports of fish and fish products from an export or exempt
 4 fishery having or likely to have an immediate and significant adverse impact on a marine mammal
 5 stock.” *Id.* at 54395.

7 On February 6, 2019, SSL, along with Sea Shepherd New Zealand (“SSNZ”) and Sea
 8 Shepherd Conservation Society (“SSCS”) (together, the “Petitioners”), submitted a petition
 9 requesting such an emergency rulemaking. Somm. Decl. Ex. 3. In it, the Petitioners asked certain
 10 U.S. government agencies (including NMFS) (the “Agencies”) to perform their non-discretionary
 11 duty under the Imports Provision to immediately ban all fish and fish products originating from
 12 fisheries in the Māui dolphin’s range. NMFS officially denied the Petition on June 18, 2019,
 13 although, as discussed below, it is clear that the agency made that decision weeks earlier. 84 Fed.
 14 Reg. 32853 (July 10, 2019). For reasons that are unclear, however, it waited until July 10, 2019 to
 15 issue a notice of the denial. *Id.*

18 On May 21, 2020, SSL filed a lawsuit on behalf of SSNZ and SSCS against the Agencies
 19 in the United States Court of International Trade (“CIT”) asserting two claims for relief: (1) the
 20 Agencies violated the Administrative Procedure Act (“APA”) by failing to ban the import of
 21 commercial fish and products from fish caught using gillnets and trawls in the range of the Māui
 22 dolphin as required by the MMPA; and (2) the Agencies’ denial of the Petition was arbitrary and
 23 capricious, an abuse of discretion, or otherwise not in accordance with the MMPA within the
 24 meaning of the APA. *Sea Shepherd New Zealand v. Wilbur Ross*, No. 1:20-cv-00112-GSK (Ct.
 25 Int’l Trade May 21, 2020) (“CIT Lawsuit”). The CIT subsequently granted the New Zealand
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1 government's request for permissive intervention as a party defendant. Somm. Decl. ¶ 5. SSL was
 2 not surprised by this intervention as documents produced in this proceeding clearly demonstrated
 3 that NMFS was working closely with the New Zealand government in an attempt to help address
 4 admitted deficiencies in New Zealand's standards for protecting the Māui dolphin from incidental
 5 mortality in commercial fisheries – with the stated goal of avoiding a trade ban. *Id.*

7 After SSNZ and SSCS filed a motion for a preliminary injunction on their first claim for
 8 relief, the CIT defendants moved for a stay and requested a voluntary remand so that NMFS could
 9 reconsider the Petition – explaining that the New Zealand government had recently announced
 10 new fishery measures intended to protect Māui dolphin and had officially requested a
 11 comparability finding. The Court granted the defendants' motion and allowed Petitioners to submit
 12 a supplemental emergency rulemaking petition. Somm. Decl. Ex. 4 ("Supplemental Petition").

14 NMFS rejected the Supplemental Petition on October 26, 2020. 85 Fed. Reg. 71297 (Nov.
 15 9, 2020). It also issued a comparability finding for the West Coast North Island multi-species set-
 16 net and trawl fisheries because, according to NMFS, the New Zealand government "has
 17 implemented a regulatory program governing the bycatch of Māui dolphin that is comparable in
 18 effectiveness to U.S. standards." *Id.* at 71298. Following NMFS's determination, the parties to the
 19 CIT Lawsuit agreed that SSNZ and SSCS would file their renewed motion for a preliminary
 20 injunction by November 25, 2020.

23 **STANDARD OF REVIEW**

24 FOIA cases are typically resolved on motions for summary judgment. *New Orleans*
 25 *Workers' Ctr. for Racial Justice v. ICE*, 373 F. Supp. 3d 16, 30 (D.D.C. 2019). FOIA expressly
 26 places the burden on the agency to sustain its handling of a FOIA request, which a court reviews
 27
 28

1 *de novo*. *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989). When the
 2 agency fails to carry this burden, the court should grant summary judgment in favor of the plaintiff.
 3 *See, e.g., Citizens for Responsibility & Ethics in Wash. v. DOJ*, 746 F.3d 1082 (D.C. Cir. 2014).
 4 FOIA’s basic purpose reflects “a general philosophy of full agency disclosure unless information
 5 is exempted under clearly delineated statutory language.” *U.S. Dept. of Air Force v. Rose*, 425
 6 U.S. 352, 360-61 (1976). The statute includes nine exemptions from disclosure, “[b]ut these
 7 limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant
 8 objective of the Act.” *Id.* at 361. FOIA exemptions therefore “must be narrowly construed.” *Id.*

11 ARGUMENT

12 Despite the Supreme Court’s repeated directive that FOIA exemptions be narrowly
 13 construed, NMFS has done just the opposite with its redactions – stretching narrow exemptions to
 14 unsupportable dimensions, as evidenced by its woefully inadequate *Vaughn* index. In addition,
 15 NMFS has not demonstrated foreseeable harm that would result from release of the redacted
 16 information. Moreover, many of the redactions are excessive. The Court should therefore order
 17 NMFS to release the redacted information to SSL immediately. If, however, the Court determines
 18 that it needs additional information before ruling on SSL’s motion because of the *Vaughn* index’s
 19 inadequacy, it should examine the records at issue *in camera* to determine if NMFS has properly
 20 applied the exemptions asserted.

23 **I. NMFS HAS FAILED TO ESTABLISH THAT THE REDACTED** 24 **INFORMATION IS EXEMPT FROM DISCLOSURE UNDER FOIA**

25 NMFS asserts that its redactions are justified under FOIA Exemptions 5, 6 and 7. *See* 5
 26 U.S.C. § 552(b)(5)-(7). To narrow the issues before the Court, SSL identified a set of 53 test
 27 records and asked Defendants to provide a *Vaughn* index explaining NMFS’s rationale for
 28

1 redacting information from those records. Somm. Decl. Ex. 5. Under Ninth Circuit precedent, a
 2 *Vaughn* index must: (1) identify each document withheld; (2) state the statutory exemption
 3 claimed; and (3) explain how disclosure would damage the interests protected by the claimed
 4 exemption.” *Citizens Comm’n on Human Rights v. Food & Drug Admin.*, 45 F.3d 1325, 1326 n.1
 5 (9th Cir. 1995). “Specificity is the defining requirement of the *Vaughn* index and affidavit;
 6 affidavits cannot support summary judgment [upholding the government’s claimed exemption] if
 7 they are ‘conclusory, merely reciting statutory standards, or if they are too vague or sweeping.’”
 8 *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987).
 9

10
 11 Here, Defendants’ *Vaughn* index is plainly inadequate to support NMFS’s redactions. It
 12 lacks detail, relies on generalized boilerplate language, and fails to provide SSL and the Court with
 13 a particularized explanation of how disclosure of the redacted information would damage the
 14 interests protected by the claimed exemptions. *See Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir.
 15 1991). NMFS has therefore failed to meet its burden of establishing that FOIA Exemptions 5, 6
 16 and 7 protect the redacted information from disclosure.
 17

18 **A. NMFS’s Redactions Under Exemption 5 Are Improper**

19 The *Vaughn* index states that NMFS redacted certain documents under Exemption 5
 20 because they reflect “internal deliberations of NMFS staff over their analysis of New Zealand’s
 21 risk assessment.” Somm. Decl. Ex. 5. Exemption 5 protects “inter-agency or intra-agency
 22 memorandums or letters that would not be available by law to a party other than an agency in
 23 litigation with the agency, provided that the deliberative process privilege shall not apply to records
 24 created 25 years or more before the date on which the records were requested.” 5 U.S.C. §
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552(b)(7). “In keeping with the FOIA’s goal of broad disclosure, Exemption 5 is construed narrowly,” *Judicial Watch, Inc. v. United States DOE*, 310 F. Supp. 2d 271, 310 (D.D.C. 2004).

To invoke the deliberative process privilege, an agency must show, *inter alia*, that the exempt record is both “pre-decisional” and “deliberative.” *See, e.g., Access Reports v. DOJ*, 926 F.2d 1192, 1194 (D.C. Cir. 1991). The agency bears the burden of establishing both elements. *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). In this case, NMFS has invoked the deliberative process privilege to redact portions of a large swath of records. SSL has examined those redactions and identified 32 records where NMFS’s reliance on Exemption 5 is improper because: (1) the records post-date NMFS’s decision to reject the Petition and are therefore not “pre-decisional”; or (2) the information redacted appears to be factual as opposed to “deliberative.”

1. Many of the redacted records are not “pre-decisional”

“A document is ‘pre-decisional’ if it precedes, in temporal sequence, the ‘decision’ to which it relates,” *Abtew v. U.S. Dep’t of Homeland Security*, 808 F.3d 895, 898 (D.C. Cir. 2015), or was “‘prepared in order to assist an agency decisionmaker in arriving at his decision,’ rather than to support a decision already made.” *Petroleum Info. Corp. v. U.S. Dep’t of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (quoting *Renegotiation Bd. v. Grumman Aircraft*, 421 U.S. 168, 184 (1975)); *see, e.g., Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006) (record must be antecedent to the adoption of an agency policy); *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (“The deliberative process privilege does not shield documents that simply state or explain a decision the government has already made[.]”).

1 The decision at issue in this case, and one of the decisions that SSL is challenging in the
 2 CIT Lawsuit, is NMFS's decision to reject SSL's 2019 petition. Although it is unclear exactly
 3 when NMFS made that decision internally, it is apparent that it had already done so when many
 4 of the records that it redacted under Exemption 5 were created. Redacted records that clearly post-
 5 date NMFS's decision to reject the Petition include:

7 **Internal NOAA Emails:** NMFS released multiple internal NOAA emails from June and
 8 July 2019 that discuss NMFS's determination to reject SSL's 2019 petition.² It is clear
 9 from the face of these emails that NMFS already had decided to reject the petition and was
 simply working on the substance and timing of the rejection notice.

10 **"Decision Memorandum":** NMFS released several versions of a "Decision
 11 Memorandum" (and records commenting on that memorandum) informing NOAA's
 12 Assistant Administrator of Fisheries of NMFS's decision to reject the 2019 petition and
 seeking his "concurrence."³

13 **Draft Federal Register Notices:** NMFS released drafts of the Federal Register Notice it
 14 eventually published to announce its decision to reject the 2019 petition.⁴ These drafts and
 15 the accompanying comments reflect deliberations over how NMFS would explain its
 decision, *not* what that decision would be, as the decision already had been made.

16 **"Roll-Out Plan":** NMFS released a "Roll Out Plan" for "Notice Rejecting Petition
 17 Requesting a Ban on Imports of Fish and Fish Products from New Zealand that Do Not
 18 Satisfy the Marine Mammal Protection Act Section 101," dated July 10, 2019.⁵

19 None of the records described above are "pre-decisional" – they all were created *after*
 20 NMFS had decided to reject the Petition. Accordingly, the deliberative process privilege does not
 21 exempt the information redacted from these records from FOIA disclosure.

24 ² See Somm. Decl. Ex. 6 (DocID 10283), Ex. 7 (DocID 10329), Ex. 8 (DocID 10350), Ex. 9 (DocID 10364), Ex. 10
 25 (DocID 10521), Ex. 11 (DocID 10527), Ex. 12 (DocID 10784), Ex. 13 (DocID 10795).

26 ³ See Somm. Decl. Ex. 14 (DocID 10283.1), Ex. 15 (DocID 10288), Ex. 16 (DocID 10372.2), Ex. 17 (DocID 10486.1),
 Ex. 18 (DocID 10491.1).

27 ⁴ See Somm. Decl. Ex. 19 (DocID 10117.2), Ex. 20 (DocID 10147.1), Ex. 21 (DocID 10397.1).

28 ⁵ See Somm. Decl. Ex. 22 (DocID 10301.1).

2. Some of the redacted information appears to be factual rather than “deliberative”

Deliberative records “reflect[] the give-and-take of the consultative process.” *Coastal States Gas Corp.*, 617 F.2d at 867. They can include “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Id.* However, “communications containing purely factual material are not typically within the purview of Exemption 5.” *Julian v. U.S. Dep’t of Justice*, 806 F.2d 1411, 1419 (9th Cir. 1986). FOIA “favor[s] disclosure of factual documents, or the factual portions of deliberative documents where such a separation is feasible.” *Assembly of Cal. v. U.S. Dep’t of Commerce*, 968 F.2d 916, 921 (9th Cir. 1992).

Here, although it is difficult to assess the contents of NMFS’s redactions because the *Vaughn* index explaining them is wholly inadequate, it appears that NMFS redacted factual information from the records it released to SSL. Such records include:

“Three Things” Memorandum: NMFS released several versions of a memorandum referred to herein as the “Three Things” memorandum, in reference to a section heading on the document’s first page.⁶ The stated purpose of the memorandum is to inform the reader of the “status of consultations with the government of New Zealand related to the petition to ban imports of fish and fish products from New Zealand that result in the incidental kill or serious injury of Māui dolphin.” NMFS redacted portions of the memoranda, including factual information that appears to relate to scientific analyses of threats to the Māui dolphin, the Māui dolphin’s interaction with New Zealand fisheries, Māui dolphin mortality, and NMFS’s consultations with the New Zealand government regarding the 2019 petition.

“Risk Assessment” Memorandum: NMFS released two versions of a “risk assessment” memorandum created by two NOAA scientists “[f]or purposes of evaluating comparability of fisheries regulations to management under the US MMPA for Māui dolphins.”⁷ One of

⁶ See Somm. Decl. Ex. 23 (DocID 10316.1), Ex. 24 (DocID 10168.1), Ex. 25 (DocID 10406.1), Ex. 26 (DocID 10116.1), Ex. 27 (DocID 10239.1).

⁷ See Somm. Decl. Ex. 28 (DocID 10316.2), Ex. 29 (DocID 10695.3).

the two versions indicates that the memorandum discusses, *inter alia*, New Zealand’s proposed mortality limit, “Potential Biological Removal” (“PBR”), and predicted levels of Māui dolphin deaths. Despite the highly factual nature of these issues, both versions of the memorandum are redacted almost in their entirety.

Notes from Consultations with the New Zealand Government: NMFS released what appear to be two sets of type-written notes from meetings with members of the New Zealand government.⁸ The notes – which, given the subject matter, almost certainly contain factual information – are almost entirely redacted. It does not appear that NMFS made any effort to separate factual information from information protected from disclosure when it made these redactions.

Thus, the unredacted information in these records strongly suggests that the redacted information includes *factual* information. To the extent that is the case, NMFS’s redactions under the Exemption 5 deliberative process privilege are improper.

B. NMFS’s Redactions Under Exemption 7(A) Are Improper

“Improper” does not begin to describe NMFS’s redactions under 5 U.S.C. § 552(b)(7), which border on the absurd. In an apparent attempt to obscure its deliberations on the 2019 Petition from public scrutiny, NMFS is withholding information responsive to SSL’s FOIA requests on the basis that the information is somehow related to law enforcement. There is absolutely no factual or legal basis for that claim. NMFS’s redactions under both Exemption 7(A) and Exemption 7(C), see *infra*, are therefore completely inappropriate.

Under Exemption 7(A), an agency may withhold disclosure of “records or information compiled for *law enforcement purposes*, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A) (emphasis added). Significantly, the first part of this inquiry

⁸ See Somm. Decl. Ex. 30 (DocID 10418.1), Ex. 31 (DocID 10593.1).

1 – whether the records were compiled for “law enforcement purposes” – is the threshold
 2 determination under Exemption 7. *Pub. Employees for Env’t Responsibility v. U.S. Section, Int’l*
 3 *Boundary & Water Comm’n, U.S.-Mexico*, 740 F.3d 195, 202-03 (D.C. Cir. 2014). If that initial
 4 requirement is not satisfied, there is no need for a court to proceed further with an analysis as to
 5 whether the exemption applies.
 6

7 **1. The redactions serve no “law enforcement purpose”**

8 Here, NMFS improperly seeks to apply Exemption 7(A) protections to agency rulemaking
 9 in an international trade context.⁹ Like Congress passing a law, the agency action in question here
 10 – issuance of a comparability finding under the MMPA Imports Provision – is legislative in nature.
 11 It also implicates issues of international trade – with the central question being should the United
 12 States ban imports from a foreign State?¹⁰ Indeed, it could not be law enforcement, as NMFS has
 13 no jurisdiction over New Zealand, a sovereign State. The MMPA makes it unlawful to *import* fish
 14 and fish products caught without a comparability finding into the United States. NMFS does not,
 15 and cannot, exercise jurisdiction over the *exports* of a foreign nation. While undoubtedly an import
 16 ban affects New Zealand, in no sense does NMFS exercise law enforcement authority over New
 17 Zealand, a sovereign state.
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20 Notably, in assessing whether a record has been prepared for law enforcement purposes,
 21 courts look to “the purpose for which the document sought to be withheld was prepared.” *FBI v.*
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 24 ⁹ See Somm. Decl. Ex. 32 (DocID 10174.2), Ex. 33 (DocID 10237.1), Ex. 34 (DocID 10237.2), Ex. 35 (DocID
 25 10349.2), Ex. 8 (DocID 10350), Ex. 36 (DocID 10433.1).

26 ¹⁰ The Import Provision was created to not only help protect marine mammals but also to protect U.S. fisher interests
 27 by creating a “level playing field” with international fishers not subject to U.S. laws like the MMPA. Reauthorization
 28 of the Magnuson-Stevens Fishery Conservation and Management Act: NOAA and Council Perspectives (Part 1):
 Hearing Before the Subcommittee on Oceans, Atmosphere, Fisheries, and Coast Guard of the S. Committee on
 Commerce, Science, and Transportation, 115th Cong., S. Hrg. 115-536, at 22 (2017).

1 *Abramson*, 456 U.S. 615, 624, 626 (1982). Courts have denied Exemption 7 protections when there
 2 is an insufficient nexus between the records at issue and an agency's law enforcement function.
 3 *See, e.g., Henderson v. U.S. Dep't of Justice*, 157 F. Supp. 3d 42, 49-50 (D.D.C. 2016). S-called
 4 "mixed-function" agencies are held to a higher standard to show that the records at issue involved
 5 the enforcement of a statute or regulation within their authority and that the records were compiled
 6 for law enforcement purposes. *See, e.g., Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C. Cir. 2002). As
 7 "mixed-function" agencies, Defendants must meet this exacting standard. They do not even come
 8 close to doing so.
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 11 According to NOAA's website, it is primarily a scientific agency; only certain discrete
 12 offices within NOAA focus on enforcing the law. NOAA's Office of Law Enforcement "enforce[s]
 13 more than 40 laws designed to protect marine life and their habitat," and "ensure compliance with
 14 the nation's marine resource laws and take enforcement action when violators disobey the laws."¹¹
 15 Additionally, the Enforcement Section of NOAA's Office of General Counsel "prosecutes civil
 16 penalty cases, permit sanctions, and administrative forfeitures; provides support to the U.S.
 17 Department of Justice in prosecution of law enforcement cases in Federal courts."¹² However,
 18 neither of those Offices were involved in the rulemaking here. Rather, NMFS's Office of
 19 International Affairs and Seafood Inspection, which has no law enforcement function, performed
 20 the rulemaking.¹³
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25 ¹¹ NOAA Fisheries, *Enforcement*, <https://www.fisheries.noaa.gov/topic/enforcement> (last visited May 4, 2020).

26 ¹² NOAA Office of General Counsel, *Enforcement Section*, <https://www.gc.noaa.gov/enforce-office.html> (last visited May 4, 2020).

27 ¹³ NOAA Fisheries, Office of International Affairs and Seafood Inspection, About Us, <https://www.fisheries.noaa.gov/about/office-international-affairs-seafood-inspection> (last visited May 4, 2020).
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1 In light of the above, Defendants' claim that the records NMFS redacted under Exemption
 2 7 were "compiled for law enforcement purposes" is simply ridiculous. 5 U.S.C. § 552(b)(7).
 3 Accordingly, *none* of NMFS's Section 552(b)(7) redactions, whether based on Exemption 7(A) or
 4 Exemption 7(C) (see *infra*), are proper. NMFS's failure to meet the threshold "law enforcement
 5 purposes" requirement ends the Exemption 7 analysis – meaning the court need not even consider
 6 SSL's other Exemption 7 arguments – and obligates NMFS to release *all* of the information
 7 withheld on that basis.
 8

9
 10 **2. There are no "law enforcement proceedings" with which to interfere**

11 To fit within Exemption 7(A), the government must show that (1) a law enforcement
 12 proceeding is pending or prospective and (2) release of the information could reasonably be
 13 expected to cause some articulable harm. *See Nat'l Lab. Relations Board v. Robbins Tire & Rubber*
 14 *Co. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). While courts have not yet clearly
 15 defined what constitutes an "enforcement proceeding," it typically entails a civil or criminal
 16 hearing. *See, e.g., Nat'l Lab. Relations Board*, 437 U.S. 214 (pending unfair labor practices
 17 hearing); *Hartman v Alexander*, 41 A.F.T.R.2d (RIA) 305 (WD Pa 1977) (pending Tax Court
 18 proceeding). Here, NMFS's rule implementing the Imports Provision does not provide for any sort
 19 of proceeding, much less a "law enforcement proceeding." *See* 81 Fed. Reg. 54390 (Aug. 15,
 20 2016). Additionally, the "usual rationales given for [applying Exemption 7(A)] is the danger of
 21 witness intimidation, the witness' desire to maintain confidentiality, and concern that premature
 22 disclosure would create a chilling effect on potential witnesses and dry up sources of information."
 23 None of those rationales are implicated in this case, nor could they be: as noted above, there was
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1 no law enforcement purpose involved in compiling the information at issue. It is therefore clear
 2 that NMFS is stretching Exemption 7(A)'s protections far beyond their contemplated purpose.

3 **3. NMFS already shared most of the redacted information with the New**
 4 **Zealand government**

5 Even if NMFS had compiled the information at issue for a "law enforcement purpose" –
 6 which it clearly did not – and even if there were a pending or prospective law enforcement
 7 proceeding related to this case – which there obviously is not given that this matter has nothing to
 8 do with law enforcement – where, as here, the FOIA request was made by a third party seeking
 9 information to which *the subject* of the law enforcement proceeding already has access, it is
 10 presumed that disclosure of such information does not harm the proceedings. *See, e.g., Coastal*
 11 *States Gas Corp.*, 617 F.2d at 870. The government must make a very particularized showing of
 12 harm to or interference with law enforcement proceedings when the subject of the proceedings
 13 already has access to the requested information. *Campbell v. Dep't of Health & Human Servs.*,
 14 682 F.2d 256, 265 (D.C. Cir. 1982). There is no such showing here.

15 It is apparent from the face of records themselves (and/or from the cover emails to which
 16 those records were attached) that NMFS shared all but one of the records it redacted under
 17 Exemption 7(A) with the *subject* of the alleged law enforcement proceeding: the New Zealand
 18 government.¹⁴ Thus, even if there were pending or prospective law enforcement proceedings
 19 regarding New Zealand's failure to protect the Māui dolphin from extinction, those proceedings
 20 could not be harmed by disclosure of information in the records released to SLL because NMFS
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27 ¹⁴ See Somm. Decl. Ex. 33 (DocID 10237.1), Ex. 34 (DocID 10237.2), Ex. 35 (DocID 10349.2), Ex. 36 (DocID
 28 10433.1).

1 already provided that information to the New Zealand government. *See Coastal States Gas Corp.*,
 2 617 F.2d at 870.

3 **C. NMFS's Redactions Under Exemptions 6 and 7(C) Are Improper**

4 Finally, NMFS has invoked FOIA Exemption 6 and 7(C) "to redact the names and other
 5 identifying information (email addresses, phone numbers, titles, etc.) of New Zealand government
 6 personnel in the mails between NMFS and the government of New Zealand."¹⁵ Sommermyer Decl.
 7 Ex. 5. An agency may withhold records pursuant to FOIA Exemption (7)(C) if the record is both
 8 "compiled for law enforcement purposes" and if the release of the records also "could reasonably
 9 be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(c).
 10 This exemption, like the other FOIA exemptions, is to be "narrowly construed." *See, e.g.*,
 11 *Abramson*, 456 U.S. at 630.

12 Similar to Exemption 7(C), Exemption 6 permits the withholding of "personnel and
 13 medical files and similar files" when the disclosure of such information "would constitute a clearly
 14 unwarranted invasion of personal privacy."¹⁶ 5 U.S.C. § 552(b)(6). In assessing the applicability
 15 of Exemption 6, courts weigh the "privacy interest in non-disclosure against the public interest in
 16 the release of the records in order to determine whether, on balance, the disclosure would work a
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18 ¹⁵ *See* Somm. Decl. Ex. 37 (DocID 10255), Ex. 38 (DocID 10227), Ex. 39 (DocID 10261), Ex. 40 (DocID 10269),
 19 Ex. 15 (DocID 10288), Ex. 41 (DocID 10291), Ex. 42 (DocID 20036), Ex. 43 (DocID 20039), Ex. 44 (DocID 10344),
 20 Ex. 45 (DocID 10349), Ex. 46 (DocID 10401), Ex. 30 (DocID 10418.1), Ex. 47 (DocID 10444), Ex. 48 (DocID
 21 10454), Ex. 48 (DocID 10711), Ex. 13 (DocID 10795) Ex. 50 (DocID 20036.1), Ex. 51 (DocID 20039.1).

22 ¹⁶ NMFS redacted four documents under Exemption 6 "to withhold personal cell phone numbers." *See* Somm. Decl.
 23 Ex. 46 (DocID 10401), Ex. 5 (DocID 10437), Ex. 47 (DocID 10444), Ex. 48 (DocID 10454), Ex. 13 (DocID 10795).
 24 SSL is not challenging redactions of personal cell phone numbers.

1 clearly unwarranted invasion of personal privacy.”¹⁷ *Lepelletier v. Federal Deposit Ins. Co.*, 164
 2 F.3d 37, 46 (D.C. Cir. 1999). The phrase “clearly unwarranted” expressly “instructs the court to
 3 tilt the balance in favor of disclosure.” *Getman v. Nat’l Lab. Relations Board*, 450 F.2d 670, 674
 4 (D.C. Cir. 1971).

5
 6 Here, as a threshold matter and as explained above, NMFS has failed to establish that they
 7 compiled the information it redacted under Exemption 7(C) for “law enforcement purposes” or
 8 that there is a pending or prospective “law enforcement proceeding.” NMFS’s redactions under
 9 Exemption 7(C) are therefore completely baseless. Moreover, with respect to NMFS’s redactions
 10 under both Exemptions 6 and 7(C), courts have consistently held that the public interest requires
 11 disclosure of identities in records where needed to serve FOIA’s core purpose of promoting
 12 government accountability. *See, e.g., Multi AG Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1232
 13 (D.C. Cir. 2008) (“FOIA is intended to ensure an informed citizenry, vital to the functioning of a
 14 democratic society, needed to check against corruption and to hold the governors accountable to
 15 the governed.”).

16
 17 In this case, SSL is entitled to learn the identities of the individuals in question because
 18 such information could reveal, among other things: (1) who inside and outside the agencies
 19 consulted on the decision; (2) whether those individuals have conflicts of interest;¹⁸ (3) whether
 20 those individuals were under political pressure to give specific recommendations; and (4) whether
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 24 ¹⁷ NMFS redacted one document under both Exemption 5 and Exemption 6, but its *Vaughn* Index entry for that
 25 document focuses only on Exemption 5 and fails to explain why Exemption 6 applies. *See* Somm. Decl. Ex. 15 (DocID
 10288). Accordingly, as NMFS has failed to meet its burden with respect to this document.

26 ¹⁸ If, for example, NMFS relied on the advice of an individual or entity with a financial interest in the agency’s
 27 handling of the 2019 Petition, that fact must be exposed to public scrutiny. *See, e.g., Washington Post Co. v. United*
 28 *States Dep’t of Health & Human Servs.*, 690 F.2d 252, 265 (D.C. Cir. 1982) (“The public disclosure of conflicts of
 interest is desirable despite its cost in loss of personal privacy.”).

1 those individuals have sufficient expertise to weigh in on issues that impact the Māui dolphin's
 2 very survival. *See Wood v. Federal Bureau of Investigation*, 432 F.3d 78, 88 (2d Cir. 2005).

3 Regarding disclosure of names of United States agency employees, courts generally favor
 4 disclosure where, as here, the agency fails to provide a *detailed* explanation of the harm to the
 5 individuals whose personal information is at issue would suffer from disclosure.¹⁹ As the Court in
 6 *COMPTTEL v. FCC*, 910 F. Supp. 2d 100, 124 (D.D.C. 2012), explained:

8 [W]hatever hypothetical privacy interests the Court may imagine, the FCC has not
 9 met its burden to show that Exemption 6 was appropriately invoked. The FCC
 10 suggests that names, office addresses, job titles, work phone numbers, etc. are
 11 'personal and private identifying information' in which 'individuals have an
 12 expectation of privacy.' However, the FCC's *Vaughn* index does nothing more than
 13 restate the law and its declaration does not even address the redactions made
 14 pursuant to either Exemption 6 or Exemption 7(C). While courts often uphold the
 15 redaction of personal identifying information under Exemption 6, the agency must
 16 at least provide the Court with some basis for such an interest. . . . While the Court
 17 can imagine situations in which a privacy interest might exist because of these
 18 individuals' roles in the FCC investigation, the FCC has not provided any such
 19 justification.

20 The identities of employees of the New Zealand government are likewise subject to
 21 disclosure under well-established precedent. For example, in *Story of Stuff Project v. United States*
 22 *Forest Service*, 345 F. Supp. 3d 79, 97 (D.D.C. 2018), the court ordered disclosure of names of
 23 "private individuals who are employed by a private business and government employees" who
 24 authored scientific reports or worked on biological surveys where the agency failed to "provide
 25 detailed information about why disclosing the withheld names would constitute an invasion of

26 ¹⁹ *See, e.g., Carlson v. United States Postal Service*, 2017 U.S. Dist. LEX 132599 (N.D. Cal. 2017) (ordering disclosure
 27 of names and email addresses of Postal Service employees); *Kleinert v. Bureau of Land Management*, 132 F. Supp.
 28 3d 79 (D.D.C. 2015) (ordering disclosure of names and contact information of BLM employees); *Unidad Latina En*
Accion v. United States DOJ, 2010 U.S. Dist. LEXIS 143992 (D.D.C. 2010) (ordering disclosure of "names of non-
 USAO government officials and any third parties").

1 | privacy.” Similarly, in *Adelante Ala. Workers Ctr. V. United States Department of Homeland*
 2 | *Security*, 376 F. Supp. 3d 345, 367 (S.D.N.Y. 2019), the court held that the identities and
 3 | professional backgrounds of certain outside experts because the “mere possibility that the release
 4 | of information could potentially lead to harassment is not evidence of a ‘real’ threat of
 5 | harassment.” Such is the case with the New Zealand government employees here.

7 | **II. NMFS HAS NOT DEMONSTRATED FORSEEABLE HARM**

8 | The FOIA Improvement Act of 2016 codified the “foreseeable harm” standard for
 9 | defending agency decisions to withhold information. *See Rosenberg v. U.S. Dep’t of Defense*, 342
 10 | F. Supp. 3d 62, 72 (D.D.C. 2018). In sum, FOIA now requires that an agency “release a record –
 11 | even if it falls within a FOIA exemption – if releasing the record would not reasonably harm an
 12 | exemption-protected interest and if its disclosure is not prohibited by law.” *Judicial Watch*, 2019
 13 | U.S. Dist. LEXIS, at *3 (internal quotation mark omitted). Moreover, if an agency decides to
 14 | withhold information under an exemption, it must provide more than “generic and nebulous
 15 | articulations of harm.” *Id.* at *4–5.

18 | The foreseeable-harm requirement “impose[s] an independent and meaningful burden on
 19 | agencies.” *Nat. Res. Def. Council v. U.S. Env’tl. Prot. Agency*, No. 17-CV-5928 (JMF), 2019 WL
 20 | 3338266, at *1 (S.D.N.Y. July 25, 2019). It was intended to restrict agencies’ discretion in
 21 | withholding documents under FOIA. *See Stone v. INS*, 514 U.S. 386, 397 (1995) (“When Congress
 22 | acts to amend a statute, we presume it intends its amendment to have real and substantial effect.”).
 23 | In this case, NMFS has abused its discretion in withholding documents because *none* of the
 24 | information it redacted would harm an exemption-protected interest if released.
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Regarding Exemption 5, “‘to satisfy the foreseeable harm standard,’ an agency ‘must explain how a particular Exemption 5 withholding would harm the agency’s deliberative process.’ An agency may not ‘perfunctorily state that disclosure of all the withheld information – regardless of category or substance – would jeopardize the free exchange of information’ among or between government officials.” *Nat. Res. Def. Council v. U.S. Env’tl. Prot. Agency*, No. 17 Civ. 5928 (JMF), 2019 U.S. Dist. LEXIS 124353, at *1 (S.D.N.Y. July 25, 2019) (internal citations omitted) (quoting *Rosenberg*, 342 F. Supp. 3d at 78) “If the mere possibility that disclosure discourages a frank and open dialogue was enough for the exemption to apply, then Exemption 5 would apply whenever the deliberative process privilege was invoked regardless of whether disclosure of the information would harm an interest protected by the exemption.” *Judicial Watch*, 375 F. Supp. 3d at 101.

Here, NMFS’s boilerplate rationale for its Exemption 5 redactions – which relies on vague and conclusory statements about the “chilling effect” and “confusion” NMFS Regarding Exemption 6 and 7(C), as noted above, courts generally tilt in favor of disclosure where, as here, the agency fails to provide a detailed explanation of the harm to the individuals whose personal information is at issue would suffer from disclosure. *See, e.g., COMPTTEL*, 910 F. Supp. at 124. Here, the Vaughn index’s boilerplate rationale for NMFS’s redaction of identifying information (email addresses, phone numbers, titles, etc.) of New Zealand government personnel provides no basis whatsoever for the Court to determine whether the individuals at issue have an actual, non-speculative privacy interest in seeing that such information is withheld from disclosure. *See Coastal States Gas Corp.*, 617 F.2d at 861.

Likewise, application of Exemption 7(A) or 7(C) to NMFS’s rulemaking does not prevent “harm [to] the Government’s case in court,” the purpose Congress intended the Exemption 7 to

1 serve. S. Rep. No. 813, 89th Cong., 1st Sess. (1965). This central purpose is reflected in court
 2 opinions upholding Exemption 7 withholdings. *See, e.g., Env'tl. Prot. Servs. v. U.S. Env'tl. Prot.*
 3 *Agency*, 364 F. Supp. 2d 575, 588 (N.D. W. Va. 2005) (noting that “[t]he disclosure of these
 4 withheld documents would prematurely reveal the EPA’s case against the plaintiff in the
 5 administrative proceeding that is currently pending.”). In enacting Exemption 7(A) “Congress
 6 recognized that law enforcement agencies had legitimate needs to keep certain records
 7 confidential, lest the agencies be hindered in their investigations,” and structured the exemption to
 8 prevent potential litigants from obtaining “earlier or greater access to agency investigatory files
 9 than they would otherwise have.” *Nat’l Lab. Relations Board*, 437 U.S. at 224-25. None of these
 10 animating concerns are present in this case. There is no risk of harming the Government’s case in
 11 court, as there is no case in court. There is no risk of litigants obtaining earlier or greater access to
 12 investigatory files, as there are no litigants.

13 In light of the above, even if the Court determines that some or all of the information NMFS
 14 redacted in the documents it released to SSL is covered by one or more FOIA exemptions, that
 15 information should nonetheless be released as its disclosure poses no foreseeable harm to any
 16 exemption-protected interest.²⁰

17 **III. SEVERAL OF NMFS’S REDACTIONS ARE EXCESSIVE**

18 Finally, even to the extent that NMFS has adequate justification to make some of the
 19 Exemption 5 and 7 redactions discussed above, several of the redactions are excessive. *See, e.g.,*
 20

21 ²⁰ In addition to the records already identified above, SSL challenges NMFS’s redactions to several other documents
 22 on the basis that the information contained therein, if released, poses no threat of foreseeable harm. *See* Somm. Decl.
 23 Ex. 52 (DocID 10343.1), Ex. 46 (DocID 10401), Ex. 53 (DocID 10595), Ex. 54 (DocID 10695), Ex. 55 (DocID 10704),
 24 Ex. 56 (DocID 10711).

1 *Hooker v. U.S. Dep't of Health & Human Servs.*, 887 F. Supp. 2d 40, 62 (D.D.C. 2012) (finding
 2 defendants' FOIA exemption redactions to be "excessive" where they "failed to adequately
 3 disclose segregable material"). If a record contains information that is exempt from disclosure, any
 4 reasonably segregable information in the record must be released after deleting the exempt
 5 portions, 5 U.S.C. § 552(b), unless the non-exempt portions are "inextricably intertwined with
 6 exempt portions," *Trans-Pacific Policing Agreement v. United States Customs Serv.*, 177 F.3d
 7 1022, 1027 (D.C. Cir. 1999). The agency bears the burden of showing that a record is non-
 8 segregable. *See Army Times Publ'g Co. v. Dep't of Air Force*, 998 F.2d 1067, 1071 (D.C. Cir.
 9 1993).

12 It appears that NMFS has failed even to attempt to meet its burden here. Under Exception
 13 5, two versions of the "Three Things" memorandum have large blocks of text redacted, and each
 14 version of the "Risk Assessment" memorandum, "Roll Out Plan," and notes from consultations
 15 with the New Zealand government are redacted almost in their entirety. Further, NMFS invoked
 16 Exemption 7(A) to redact substantial blocks of text in one version of the "Risk Assessment"
 17 memorandum²¹ – other versions of which it had instead redacted under Exemption 5²² – and a
 18 draft "Decision Memorandum."²³ It also *completely* redacted one record such that it is impossible
 19 to discern the record's author, recipient(s), creation date, or subject matter.²⁴ Nothing in NMFS's
 20 conclusory *Vaughn* index explains why these records are non-segregable or why such sweeping
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25 ²¹ See Somm. Decl. Ex. 56 (DocID 10174.1).

26 ²² See, e.g., Somm. Decl. Ex. 28 (DocID 10316.2), Ex. 29 (DocID 10695.3).

27 ²³ See Somm. Decl. Ex. 34 (DocID 10237.2).

28 ²⁴ See Somm. Decl. Ex. 36 (DocID 10433.1).

redactions are justified. *See, e.g., Plunkett v. DOJ*, No. 11-0341(RDM), 2015 U.S. Dist. LEXIS 115469, at *35 (D.C. Dist. Sept. 1, 2015) (concluding that agency failed to meet its burden where the *Vaughn* index did not “provide sufficient detail for the Court to evaluate whether the redactions were limited, as required, only to exempt or reasonably non-segregable information). Given that “disclosure, not secrecy” is FOIA’s “dominant objective,” these excessive redactions are improper. *Rose*, 425 U.S. at 361.

IV. IF NECESSARY, THE COURT SHOULD INSPECT THE RECORDS AT ISSUE *IN CAMERA*

As shown above, all of NMFS’s redactions under Exemption 7 were improper because the agency did not compile the records at issue for “law enforcement purposes” and there is no pending or prospective “law enforcement proceeding” with which to interfere; the Court need not even look at Defendants’ *Vaughn* index explanation for Exemption 7 redactions to make that determination because the subject matter of the individual records is irrelevant. Moreover, it is apparent from the face of the records that all of NMFS’s redactions stretch the FOIA exemptions invoked beyond their plausible reach. SSL therefore believes the Court can find that the redactions are improper based on the record before it, notwithstanding the fact that Defendants’ *Vaughn* index lacks detail, relies on generalized boilerplate language, and fails to provide SSL and the Court with particularized explanations of how disclosure of the redacted information would damage the interests protected by the claimed exemptions. *See Wiener v. Federal Bureau of Investigation*, 943 F.2d 972 (9th Cir. 1991).

SSL recognizes, however, that where an agency’s *Vaughn* index “provides insufficient detail for the court to determine whether the withheld documents qualify for the claimed exemption,” *Favish v. Office of Indep. Counsel*, 217 F.3d 1168, 1177 (9th Cir. 2000), “in camera

1 inspection may be necessary to allow meaningful de novo review.” *Carter v. United States Dep’t*
 2 *of Commerce*, 830 F.2d 388, 392 (D.C. Cir. 1987). Accordingly, if the Court determines that it
 3 cannot assess whether the information at issue is exempt because Defendants’ *Vaughn* index is
 4 inadequate, SSL requests that the Court, at its discretion, review the records at issue *in camera* to
 5 determine if NMFS has properly applied the exemptions asserted. *See, e.g., American Civil*
 6 *Liberties Union v. U.S. Dep’t of Defense v. United States DOD*, 628 F.3d 612, 626 (D.C. Cir. 2011)
 7 (“Congress intended to . . . leave the decision of whether to conduct *in camera* inspection to the
 8 broad discretion of the trial judge.”).

11 CONCLUSION

12 There is no genuine dispute as to any material fact in this case, and SSL is entitled to
 13 judgment as a matter of law. Defendants’ withholdings are beyond the permissible scope of
 14 Exemptions 5, 6 or 7 and are inconsistent with the purposes of those exemptions. For these reasons,
 15 this Court should grant SSL’s Motion for Summary Judgment.

16 Dated this 19th day of November, 2020.

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 19 Respectfully submitted,

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